No. .....

In The

Supreme Court of the United States

MESCALERO APACHE TRIBE,

Petitioner,

vs.

FRED L. O'CHESKEY, AS COMMISSIONER OF REVENUE OF AND FOR THE STATE OF NEW MEXICO AND HIS SUCCESSORS IN OFFICE; THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO; AND THE STATE OF NEW MEXICO,

Respondents.

BRIEF OF AMICUS CURIAE STATE OF MONTANA IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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Pursuant to Rule 42 of the Supreme Court Rules, the State of Montana files this brief as *amicus curiae.*

INTEREST OF AMICUS CURIAE

The State of Montana has within its borders seven large areas of land set aside as Indian reservations. Lo-

cated within each reservation are tribal members and non-members.[1] Montana has consistently asserted taxation jurisdiction over non-Indians within the exterior boundaries of these reservations. In a case similar to the present one, Montana asked this Court to uphold its authority to impose nondiscriminatory state taxes on non-Indians transacting business on an Indian reservation. *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U. S. 463 (1976).

In a case currently pending before the Ninth Circuit Court of Appeals, the Crow Tribe of Indians has challenged application of Montana's coal severance tax and gross proceeds from coal tax to non-Indian coal producers mining off-reservation coal in which the Tribe has a beneficial interest.[2] *Crow Tribe of Indians v. State of Montana, et al.*, 9th Cir. No. CA-79-4321. The Crow Tribe made "economic burden" arguments similar to those made by the Mescalero Apache Tribe here. The United States District Court for Montana upheld the state taxes using the legal incidence test, 469 F. Supp. 154 (D. Mont. 1979), as did the Tenth Circuit Court of Appeals in this case. The Montana District Court found that the state taxes were reported and

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1 *See*, for example, *United States v. State of Montana*, 604 F. 2d 1162, 1164 (9th Cir. 1979), *cert. granted*, April 13, 1980, describing the Crow Indian Reservation, and *Confederated Salish and Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1313 (D. Mont. 1975), describing the Flathead Indian Reservation.

2 Montana Coal Severance Tax Act, §§ 15-35-101 through 15-35-110, and Montana Gross Proceeds from Coal Tax Act, §§ 15-23-701 through 15-23-704, Montana Code Annotated, 1979. The nature of these taxes is admittedly different from the New Mexico tax at issue here, but for the limited purpose of this Brief's explanation of the legal incidence test, the taxes are similar.

paid by non-Indians, and that those non-Indians had no right to claim a tribal tax exemption.

Montana has a vital interest in the Tenth Circuit's decision because it reaffirms the long-accepted legal incidence analysis which resolves numerous questions regarding the respective powers of states and tribes. Protection of that analysis and the judgment here is necessary to assure a principled and predictable approach to similar questions, and to avoid the inevitable chaos which will result if the Mescalero Apache Tribe's theory is accepted in this case.

STATEMENT OF THE CASE

This case involves the imposition of the New Mexico gross receipts tax, N. M. Stat. Ann. §§ 72-16A-3F, K, *et seq.* (1978), on non-Indian building contractors who performed construction work for the Mescalero Apache Tribe within the boundaries of both the Mescalero's reservation and the State of New Mexico. The major projects were the Inn of the Mountain Gods resort and related tourist facilities. The complex was funded almost entirely from Economic Development Administration grants, Petition for Writ of Certiorari (hereafter "Pet."), 6c, and Petitioner furnished no capital for the cost of construction. Pet., 11c. EDA guidelines permit inclusion of the cost of "passed-on" state taxes in grants. Pet., 6c. The Federal District Court and the Tenth Circuit Court of Appeals found the legal incidence test to be applicable, and, after applying the test and finding the incidence to be on the non-Indian contractors, held the challenged taxes permissible. *Mescalero Apache Tribe v. O'Cheskey,* 439 F. Supp. 1063, 1072 (D. N. M. 1977), *affirmed,* 625 F. 2d 967, 970 (10th Cir. 1980).

REASONS FOR DENYING THE WRIT

I. Application of the legal incidence test is necessary to determine which parties have a legal interest in the taxation so that the proper rules of law may be applied as between those parties.

A. The legal incidence test is the only method by which the legally interested parties may be determined.

The decision and mode of analysis of the Tenth Circuit Court of Appeals were correct. The Court considered the validity of taxes which were legally due from non-Indians, but which were challenged on the basis of a tribal tax immunity. In determining that the taxes were valid, the Court properly applied the only rational test available to it—the legal incidence test. The test was simple. The Court examined the wording of the tax statutes challenged and determined who was legally liable for the payment of the tax. The Court correctly held that the non-Indian contractor doing business with the Tribe was liable for payment of the New Mexico Gross Receipts Tax. Thus, the Court applied the legal incidence test to identify which party was legally liable for the payment of the tax, and correctly determined that that non-Indian party was not entitled to tax exemptions reserved for Indians.

The legal incidence test has been used frequently by this Court and others in determining whether or not a party is entitled to a tax immunity. *Washington v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* — U. S. — (slip opinion at p. 5, n. 9) (1980); *Moe v. Confederated Salish and Kootenai Tribes of the*

Flathead Reservation, 425 U.S. 463 (1976); *Thomas v. Gay,* 169 U.S. 264 (1898). *See also, Fort Mojave Tribe v. County of San Bernardino,* 543 F. 2d 1253, 1257 (9th Cir. 1976), *cert. denied,* 430 U.S. 983 (1977); *Agua Caliente Band of Mission Indians v. County of Riverside,* 442 F. 2d 1184, 1186 (9th Cir. 1971), *cert. denied,* 405 U.S. 933 (1972). The application of the legal incidence test is the *first* test which must be applied to disputes such as the one involved in this case. Other tests are considered only after the legal incidence test has been applied and the parties legally interested in the taxes have been identified.

Petitioner does not contend, nor could it contend, that the legal incidence of the challenged tax falls upon the Tribe. The legal incidence of the tax is clearly upon the non-Indian contractors, as the court below found. *Mescalero Apache Tribe v. O'Cheskey, supra,* 625 F. 2d at 968-69. Because the proper application of the legal incidence test defeats any possible claim by Petitioner that the tax is invalid, Petitioner chooses to argue that the test simply does not apply. Pet., 8-9. Petitioner is pleading that this Court apply purported rules of Indian law to a dispute which is really between the State of New Mexico and non-Indian citizens of the State. Petitioner asks this Court to indulge in the very evil eschewed by the legal incidence test: the use of rules of Indian law which do not apply between the parties with a legal interest in the tax challenged.

The legal incidence test provides the only mode of analysis yielding predictable and rational results in challenges to tax statutes. Only by using that test can one correctly determine which party is liable for the payment of the tax, and which party may properly challenge the tax.

B. The use of an "Economic Burden" test to determine the legally interested parties is contrary to established law.

The legal incidence test is the only manner by which the proper parties, and thus the proper rules, may be determined. Petitioner's contention that the alleged existence of a resulting economic burden on it requires that the legal incidence test not be applied is clearly incorrect. The economic effect is not only irrelevant, *White Mountain Apache Tribe v. Bracker,* — U. S.—, 48 USLW 4897, 4901, n. 15 (1980); *Gurley v. Rhoden,* 421 U. S. 200, 204 (1975); *Polar Co. v. Andrews,* 375 U. S. 361, 382 (1964), but also undefinable. In this case, it is utterly impossible to determine who will ultimately pay all or any part of the tax. *See, Mescalero Apache Tribe v. O'Cheskey,* 625 F. 2d 967, 970 (10th Cir. 1980). Will it be the non-Indian contractors who pay the tax? Will the contractors pass the cost of the tax on to the Petitioner under the indemnification agreement? Will Petitioner eventually pass the cost on to the tourists patronizing the Inn of the Mountain Gods? Will the tourists pass the cost on to their employers in the form of higher wage demands to cover their vacation costs?[3] The legal incidence test allows each entity along the eco-

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3 If the costs are traced in a different direction, an initial economic burden may fall on the Economic Development Administration under its guidelines which permit grants to cover "passed-on" state taxes. Pet., 6c. *Compare, White Mountain Apache Tribe v. Bracker,* — U. S. —, 48 USLW 4897, 4901 (1980) where state taxes were not already part of the established "Federal calculus." Further, since any tribal economic burden can be so easily passed on under EDA guidelines in this case, it is clear that Petitioner faces no economic threat —the pockets of the Tribe are just as "deep" as those of the EDA.

nomic chain to claim only the immunities which it possesses. Under Petitioner's rationale, there is no reason for the Tribe to refrain from challenging imposition of state taxes on the contractor's off-reservation or out-of-state suppliers, as such assessments have an identical impact on costs to Petitioner. The Tribe could also prevent the states from taxing the employees of the contractor's nonresident suppliers, and anyone from whom those employees make a purchase, *ad infinitum*. There would be no tax, imposed by any state on anyone, which could withstand Petitioner's economic burden argument. The legal incidence test reveals the only fact which can be consistently found and applied as a line of demarcation, and which can determine what entity has sufficient interests in the taxation. *See, United States v. City of Detroit,* 355 U.S. 466, 472-473 (1958); *Alabama v. King and Boozer,* 314 U.S. 1, 8-9 (1941). While it is true that some of the cases establishing the legal incidence test as the proper mode of analysis involve the United States government rather than a tribal government, it is apparent that striking down this state tax would attribute a greater sovereignty to tribes than the United States enjoys since the United States must pay this particular tax to New Mexico. *United States v. New Mexico,* 581 F. 2d 803 (10th Cir. 1978).

C. The preemption rules applicable to Indian cases are irrelevant to this case.

Petitioner has contended that the proper mode of analysis in this case is preemption. Pet., 9. *Amicus* takes exception to Petitioner's substantive preemption arguments, but agrees that, in general, preemption is the usual mode of analysis in Indian cases.[4] *See, Mescalero Apache Tribe v. Jones,* 411 U. S. 145 (1972); *McClanahan v. Arizona State Tax Commission,* 411 U. S. 164 (1972). However, such an analysis is incorrect here because this is not, in reality, an Indian case.

The legal incidence test was properly used by the Tenth Circuit and it revealed that there is no legally cognizant tribal interest. The substantive rules of law governing Indian cases are irrelevant and do not apply to a dispute between a state government and its non-Indian citizens.

CONCLUSION

The decision of the Court below is correct. It is based upon a theory, repeatedly utilized and reaffirmed by this Court, which provides the only means whereby disputes between states and non-Indians doing business on Indian reservations may be resolved with any degree of consistency and predictability. To hold that the legal incidence

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4 Even assuming that the preemption analysis should be used to resolve this case, Petitioner must fail. See, New Mexico's Brief of Respondents in Opposition.

test does not control this case would allow innumerable non-Indians to reap for themselves the tax exemptions belonging to tribal Indians.

The Petition for a Writ of Certiorari should be denied.

DATED this 14th day of January, 1981.

Respectfully submitted,

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